



STAFF REPORT

To: Gallatin County / Bozeman Area Board of Adjustment

From: Amy Waring, Code Compliance Specialist

Subject: Martel Appeal
2104 Spring Creek Drive, Bozeman, MT

Hearing Date: December 16, 2008 at 2:00 pm

Location: Gallatin County Courthouse – Community Room
311 W. Main, Bozeman, MT

BACKGROUND

Jason and Shelly Martel own two parcels of land, collectively referred to as 2104 Spring Creek Drive, Bozeman, Montana. The property consists of two legal tracts of record with the following legal descriptions:

- A. Parcel I: Lot 5, Block 1, Thompson Addition #3, Section 18, Township 2 South, Range 6 East, Gallatin County, Montana. The Martel's primary residence is located on this parcel. This parcel is located within the City of Bozeman, and is outside the purview of the Gallatin County Code Compliance Specialist's determination.
- B. Parcel II: Lot 5A, Adjacent to Lot 5, Block 1, Thompson Addition #3, Section 18, Township 2 South, Range 6 East, Gallatin County, Montana. The sport court and accessory structure are located on this parcel. This parcel is located in the R-1 District of the Gallatin County / Bozeman Area (GC/BA Zoning District) in Gallatin County.

On September 27, 2007, and in response to a complaint, the Gallatin County Floodplain Administrator sent a cease and desist order to Jason and Shelly Martel for construction activities that may be occurring in a regulatory floodplain at 2104 Spring Creek Drive on the county tract of record. At that time, the Martels were also advised that a land use permit is required "for this project" on the Gallatin County tract. **Exhibit A**

On October 11, 2007, Mr. Martel submitted information regarding the floodplain analysis prepared by Jonathan Roen and a land use permit application (L08-079) for an “Agricultural/ Recreation/Tool Shed” (i.e. the Accessory Structure/Warming Hut). **Exhibit B.** It is noteworthy that the information submitted by Mr. Martel included a map prepared by Roen Inc. that identified a warming hut and court/rink; however the LUP application was only for the 600 sq. ft. accessory structure. It did not include the ice rink. The Floodplain Administrator subsequently concurred with Mr. Roen’s determination that the structures are not located within a regulatory floodplain.

On October 19, 2007, Planner Ada Montague performed a land use permit inspection on the Martel property and noted the location of both the warming hut/accessory structure and the sport court. **Exhibit C.** Since the pending LUP application was only for the 600 sq. ft. accessory structure, Ms. Montague’s written response to Mr. Martel on October 22, 2007 only addressed the structure in question. She stated that the “warming hut” is 6 feet too close to the southern property line, and that he could try to relocate the boundary with his neighbor, or apply for a variance from the side yard setback requirements. **Exhibit D**

However, Ms. Montague’s observations of the sport court triggered a “red flag” and she brought her observations to the attention of the Planning Director, other Planning staff, and the Code Compliance Specialist. Gallatin County subsequently determined that the sport court is a “structure” as defined in Section 4.1550 of the GC/BA Zoning Regulations, and that a land use permit would be required. Ms. Montague verbally conveyed this information to Mr. Martel in a phone conversation that took place within one week of her October 22, 2007 letter. Ms. Montague further advised Mr. Martel that he may wish to pursue annexation with the City of Bozeman as a way to potentially resolve the setback encroachment problem, and to eliminate the discrepancy caused by two lots in separate jurisdictions.

On January 4, 2008, the Code Compliance Specialist sent a certified letter to Jason Martel with a cease and desist order for construction of the warming hut and also provided notice that he must apply for a variance for setback encroachments and after-the-fact land use permits for both structures (i.e. the warming hut/accessory structure and ice rink/sport court). **Exhibit E**

Mr. Martel submitted an annexation application to the City of Bozeman for Parcel II (Lot 5A). The Code Compliance Specialist elected to wait for the outcome of the annexation process before pursuing additional enforcement remedies available to Gallatin County. On July 16, 2008, Mr. Martel notified the Code Compliance Specialist that he was withdrawing his annexation request to the City of Bozeman due to the amount of public opposition.

During June and July, 2008, the Code Compliance Specialist received over 20 complaints regarding Mr. Martel’s sport court and “warming hut” and perceived associated impacts. The Code Compliance Specialist inspected the structures (warming hut/accessory structure and sport court) on July 17, 2008 and September 3, 2008, and measured the sport court setback encroachments with a measuring tape during the September 3, 2008 inspection. Inspection photos from the July 17, 2008 inspection are included as **Exhibit F.**

On September 15, 2008, the Code Compliance Specialist issued a formal decision addressing all of the complaints received, and further determined that Mr. Martel's sport court is a "Structure" as defined by the GC/BA Zoning Regulations, is subject to setback requirements, and requires a land use permit. **Exhibit G**

On October 13, 2008, Mr. Martel submitted an appeal of the Code Compliance Specialist's September 15, 2008 determination that his sport court is a "Structure," is subject to setback requirements, and requires a LUP. **Exhibit H.** The appeal was timely.

COMPLIANCE FINDINGS

1. The subject property, Lot 5A, Parcel II, is owned by Jason and Shelley Martel and is located in the R-1 District of the Gallatin County / Bozeman Area Zoning District.
2. The **Gallatin County / Bozeman Area Zoning Regulations** were adopted on July 27, 1999 and subsequently amended. They include the following provisions:
 - A. **Section 62.030 Permit Requirements.** "No building or other **structure** shall be erected, moved, added to, or structurally altered and no land use shall be changed without valid permits." Section 62.030(E) further provides that a Land Use Permit (LUP) shall be obtained from the Gallatin County Planning Department.
 - B. **Section 4.1550, definition of a Structure:** "Anything constructed or erected which requires location on the ground."
 - C. **Section 4.220, definition of a Building:** "Any structure having enclosed space and a roof for the housing and/or enclosure of persons, animals or chattels, except mobile homes, recreational vehicle and mobile offices."
 - D. **Section 14.020(C) Permitted accessory uses in the R-1 District:** Include other buildings and structures typically accessory to residential uses, and private or jointly owned community center recreational facilities, pools, tennis courts, and spas.
 - E. **Section 14.050 Yards.** Every lot in the R-1 District shall have a 25-foot front and rear yard setback and 12-foot side yard setbacks.
 - F. **Section 50.030(A). Only uses specifically identified by this title to be built.** "No building, or structure or part thereof shall be altered, enlarged for a use, nor shall any existing building, structure, or part thereof, or land, be used for a purpose or in a manner that is not in conformity with the uses listed as permitted uses for the zone in which such buildings, structure, or land is situated."
 - G. **Section 50.035 (A)(1). Glare and Lighting.** Light shall be directed down and/or away from any adjoining residential district, and shall not detract from driver

visibility on adjacent streets. In addition, all lighting (except for security purposes) shall be turned off between eleven p.m. and six a.m. (11pm-6am).

- H. **Section 50.060(D) Watercourse Setbacks.** Requires a 35-foot setback from structures to the mean high water mark and also requires a 5-foot vegetative buffer.
- I. **Section 50.070 Fences, walls and hedges.** Fences may be constructed on the lot line or within the setback provided they do not exceed eight feet in height (4 feet in any corner side yard or front yard).
3. The sport court is a “private recreational facility” which is a permitted accessory use in the R-1 District (Section 14.020(C)). The sport court is not a patio, terrace, uncovered deck, stoop or similar feature that is *attached to, or part of the principal structure* (i.e. the residence).
4. The sport complex includes a concrete sport court measuring 60’10” wide by 100’6” long (approximately 6000 sq. ft.) that is surrounded in part by solid walls approximately three feet high. The court is further surrounded on three sides by an eight foot fence erected on the property line, and also has four large light posts. **Exhibit F**
5. The sport court was constructed of reinforced concrete and so constructed/located on the ground. It has an impenetrable and impermeable surface of a permanent nature.
6. The sport court encroaches into the side yard, rear yard, and watercourse setbacks. In order to meet all setback standards, the sport court would have to be reduced in length by 14 feet, 6 inches (14’6”) and in width by 24 feet (24’). The reduced dimensions amount to approximately 3096 sq. ft., or roughly half the existing court size. The setback encroachments are identified in the table below:

Martel Sport Court Setback Encroachments

Setback	Zoning Regulation	Existing Setback	Violation Encroachment
South side yard	12’	4’ 6”	7’ 6”
North side yard	12’	5’	7’
Rear yard setback	25’	5’	20’
Watercourse setback	35’	31’	4’

7. The GC/BA Zoning Regulations define a structure as anything constructed or erected which requires location on the ground (Section 4.1550). Based upon the above findings and a literal reading of the zoning regulations utilizing the rules of statutory construction, the sport court is a structure, requires a land use permit (LUP), and is subject to setback requirements.

COMPLIANCE DECISION & APPEAL

8. On September 15, 2008, the Code Compliance Specialist issued a decision in response to numerous complaints alleging zoning violations at the Martel residence at 2104 Spring Creek Drive, Bozeman, MT. **Exhibit G.** The decision addressed the following issues:
 - A. Accessory structure (“warming hut”)
 - B. Sport Court (“hockey or ice rink”)
 - C. Lighting
 - D. Fence
 - E. Noise
9. On October 13, 2008, Jason Martel submitted an appeal of the Code Compliance Specialist’s September 15, 2008 decision. **Exhibit H.** The appellant states, “the Martels are appealing Code Compliance Specialist Amy Waring September 15, 2008 determination that the concrete slab which the Martels intend to use for various recreational purposes is a structure that cannot encroach into side yard, rear yard, and watercourse setbacks.”
10. The Martel’s appeal states in the alternative (i.e. the appeal is denied), then they request a variance to permit the concrete slab in its current location. If the Code Compliance Specialist is affirmed, then the variance request will be scheduled before the BOA in January 2009. If the Code Compliance Specialist’s decision is reversed, a variance would not be required. Thus, the variance request for encroachments into the side, rear, and watercourse setbacks is outside the scope of this appeal hearing.
11. Due to the limited nature of the Martel’s appeal, the scope of this appeal hearing is limited to whether or not the sport court is a structure, is subject to setback requirements, and requires a land use permit. No other appeal was received. Therefore, continued objections regarding other matters (accessory structure, lighting, fence, and noise) are outside the scope of this appeal.
12. Appellants allege that the Code Compliance Specialist was in error, and that the decision should be reversed. Appellants state that a reversal of the September 15, 2008 decision will enhance the neighborhood by providing the Martel children and their friends with a private recreational area, thus promoting the peace, health, safety, and general welfare of Gallatin County’s future residents. The Martels present three arguments for why the decision was in error and should be reversed.

A. The Martels may use their property for recreational purposes.

Appellants allege that the Code Compliance Specialist was in error and that her conclusion that the sports complex (encompassing the concrete slab, perimeter fence, and lights) is a structure confuses permitted *use* with the separate inquiries necessary as to

whether the pad is a *structure*, whether the lights are *structures*, and whether a perimeter fence is a *structure*, each of which purportedly would require a land use permit.

Appellants state that regardless of whether the concrete pad remains or is removed in whole or in part, nothing prevents the Martels from using the vary ground upon which the pad was poured for ice skating, hockey games, soccer, croquet, volleyball, etc.

Compliance Response: Gallatin County does not dispute the fact that Martels may use their property for recreational pursuits. A private recreational facility is a permitted use in the R-1 District.

The Code Compliance Specialist did not confuse the recreational use of the back lot with a determination on whether the concrete pad, fence, and lights are a structure. The use is allowed. The large slab of concrete is a structure that has to meet setbacks. The lights and fence would not be there, but for the slab of concrete being used for recreation. The Code Compliance Specialist did not have any issue with the lights or fence, and only requested that they be included on a site plan for a land use permit for a recreational sports complex.

Further, appellants claim that the lights and fence were depicted on a site plan at the time the first land use permit was submitted on October 11, 2007 is false. The floodplain maps prepared by Roen Inc. identify a “warming hut” and “court/rink” but the plans do not specifically identify a perimeter fence or lights.

B. Nonpermeable pavement is a Landscape Design Element.

Appellants assert that the concrete slab is a landscaping element and not a *structure* because it is intended for use as a play area, and not as a structural component for a building. Appellants looked to Section 46 (landscaping standards) to bolster this argument.

Pursuant to Section 46.010(B)(2)(a), appellants claim that the landscaping standards only apply to front yards for a single family residence. They further allege that the zoning regulations would permit a person to pave their entire side and back yards because there is nothing in the regulation that would restrict, prohibit, quantify, or limit the use of nonpermeable pavement in the side and rear yards.

Appellants conclude that the concrete pad is a nonvegetative landscape design element, and that the zoning regulations fail to regulate or restrict use of nonpermeable materials in any landscape design.

Compliance Response: The Code Compliance Specialist disagrees with appellant’s conclusion that the sport court is a landscape design element, and that the zoning regulations do not provide standards for permeable/nonpermeable materials in the rear and side yards.

Section 46.010(B)(2)(a) of the GC/BA Zoning Regulations (landscaping standards) states:

“Notwithstanding the application of subsection B.1 above, these (landscaping) provisions shall not apply to the following:
a. Lots containing only single-family and or residential duplex uses when located outside entryway corridors, except that such lots shall be subject to subsection 46.040.C (Street Frontage Landscaping Required).”

Section 46.040 (Mandatory Landscaping Provisions) states:

A. Yard Landscaping Required. *For all uses in all districts, unless otherwise provided by specific approval through design review procedures, all front, side, and rear yards, exclusive of permitted access drives, parking lots, and accessory structures, shall be landscaped as defined herein. All landscaped areas shall be perpetually maintained in a healthy condition.*”

The Rules of Statutory Construction requires both regulations be read together. In case of conflict, the more restrictive prevails. In this case, Section 46.040(A) requires the front, side, and rear yard to be landscaped, as opposed to 46.010(B)(2)(a), which would seem to only require landscaping for a front yard on residential lot. Thus, the Code Compliance Specialist concludes that the rear and side yards must be landscaped.

Section 46.020 defines “Landscaping” as:

“At least seventy-five percent (75%) coverage of an area with natural grass, vegetative groundcover, or other natural living plant materials, the remainder of which is covered with nonvegetative decorative landscape design elements such as washed rock, lava rock, bark chips, and ornamental features such as pools, fountains, benches, etc. For purposes of this title, the term landscaping shall be considered to have the same meaning as the term landscape, landscaped, and landscaped area.”

Section 4.1820 defines “Yard” as:

“A space on the same lot with a principal building, which is open and unoccupied from the ground upward or from the ground downward other than by steps, walks, terraces, driveways, lamp posts and similar structures, and unobstructed by structures, except as otherwise provided in this title.”

Section 4.1850 defines “Yard, rear” and Section 4.1870 defines “Yard, side.” These are the setbacks. In the case of the Martel property, there exists a 12-foot side yard setback and a 25-foot rear yard setback.

A reasonable interpretation of the landscaping standards is that at least 75% of the side and rear yards must be landscaped with living plant material, and that the entire area could not be entirely paved as appellants claim.

Additionally, the definition of landscaping provides an indication of what is considered acceptable nonvegetative decorative landscape design elements (washed rock, lava rock, bark chips, and ornamental features such as pools, fountains, benches). Appellants explicitly state that the purpose of the concrete slab is for recreation. Therefore, it is a recreational structure, and not a landscape design element.

C. A Structure is anything constructed or erected which requires location on the ground; a structure is not ground covering.

Appellants allege that the concrete slab was not constructed or erected. Rather it was *poured* as a ground covering. Appellants further state the purpose of the concrete slab is for their children and friends to have a safe, healthy place to ice skate, and engage in all sorts of social and recreational activities.

Compliance Response: Section 46.020 of the GC/BA Zoning Regulations defines “Groundcover” as:

“Natural mulch or plants of species which normally reach a height of less than two feet upon maturity, installed in such a manner so as to form a continuous cover over the ground.”

Regardless of being constructed, erected, or poured, a concrete slab is not natural mulch or a plant. It is not “Groundcover” as defined by the GC/BA Zoning Regulations.

Additionally, appellants explicitly state that the purpose of the concrete slab is for recreation. Therefore, it is a recreational structure, and not a groundcover.

STAFF SUGGESTED ACTION

Pursuant to MCA Section 76-2-223(a) and Section 56.030(A)(1) of the GC/BA Zoning Regulations, the Gallatin County / Bozeman Area Board of Adjustment (BOA) shall hear and decide appeals where it is alleged there is an error made by an administrative official, and it is the BOA’s duty to reverse or affirm, wholly or partly, or modify the September, 15 2008 decision by the Code Compliance Specialist. Pursuant to MCA Section 76-2-224, the concurring vote of three members of the BOA is necessary to reverse the September 15, 2008 decision.

The Gallatin County / Bozeman Area Board of Adjustment, after hearing and considering all public testimony, must determine if the September 15, 2008 decision by the Code Compliance Specialist was made in error, and either affirm, modify, or reverse the decision.

This appeal, and the BOA's decision, is limited to affirming, modifying, or reversing the Code Compliance Specialist's decision that the sport court is a structure, is subject to setback requirements, and requires a land use permit.

The reasons to support a decision to affirm the Code Compliance Specialist's include, but are not limited to:

1. The sport complex includes a concrete sport court measuring 60'10" wide by 100'6" long (approximately 6000 sq. ft.) that is surrounded in part by solid walls approximately three feet high. The court is further surrounded on three sides by an eight foot fence erected on the property line, and also has four large light posts. The sport court was constructed of reinforced concrete and so constructed/located on the ground. It has an impenetrable and impermeable surface of a permanent nature. The sport court meets the definition of structure provided in the GC/BA Zoning Regulations (anything constructed or erected which requires location on the ground."
2. The sport court is a recreational structure, not a landscape design element.
3. The sport court is a recreational structure, not a groundcover.

EXHIBITS

- A. September 27, 2007 Cease & Desist Order from the Floodplain Administrator
- B. October 11, 2007 LUP application and floodplain information submitted by Jason Martel
- C. October 17, 2007 inspection photo taken by Ada Montague
- D. October 22, 2007 letter from A. Montague to J. Martel regarding warming hut
- E. January 4, 2008 Cease & Desist Order from the Code Compliance Specialist, also advising that both the sport court and warming hut will require variances and LUP's
- F. July 17, 2008 Code Compliance Specialist inspection photos
- G. September 15, 2008 Decision
- H. October 13, 2008 Appeal